No. 96-1747

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HYOK S. LEW,

Pro Se Petitioner,

—v.—

ROSEMOUNT, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 2, 1997

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

Respondent does not believe that there are any issues properly before this Court. However, if certiorari were granted, the questions for review should be as follows:

1. Has the petitioner identified a cognizable question for review by this Court on a writ of certiorari?

2. Is it within the province of the Court of Appeals to issue a judgment of affirmance without an opinion?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Rosemount Inc. ("Rosemount") is a wholly-owned subsidiary of Emerson Electric Co.

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STATEMENT OF THE CASE

Petitioner Hyok S. Lew's ("Lew's") brief in support of his petition provides no legitimate reason why this Court should exercise its discretion and review the decisions below.

The District Court's dismissal of this patent infringement action was not the result, as petitioner contends (Petition 3-7), of any alleged "unfairness" or "racial bias." To the contrary, the District Court dismissed this action because of petitioner's obstreperous conduct throughout the proceedings, including his repeated refusals to comply with Court Orders despite warnings from the District Court that such refusal would result in dismissal. (R.A.5-21.)[1] Petitioner's behavior before the District Court constituted nothing less than an "unconscionable abuse of the judicial process." (R.A.6.)

The record is replete with examples of petitioner's abuse of the judicial process. The following, which the District Court recognized and relied on in dismissing the action, are illustrative (R.A.5-21):

- Petitioner "firmly and unalterably" refused to appear for his deposition, despite warnings that such refusal was grounds for dismissal.
- Petitioner obstructed Rosemount's efforts to serve a subpoena on a family-run corporation, despite the fact that petitioner's wife and two adult sons, all of whom are principals, live at his residence.
- Petitioner refused to accept a translation of an anticipating Japanese prior art reference as the official translation despite the incorporation of every one of petitioner's specific objections to such translation.

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1 "R.A." refers to Respondent's Appendix.

- Petitioner insisted on hurling invective and accusations at defense counsel and the District Court, despite repeated warnings that his pleadings would be stricken if such behavior continued.

Prior to dismissal, the Magistrate Judge issued numerous warnings to petitioner, but to no avail. (R.A.9-21.) In accordance with controlling precedent, the Magistrate Judge recommended that the action be dismissed. (R.A.9-21.) The District Court accepted this recommendation (R.A.5-8) and the Court of Appeals for the Federal Circuit affirmed (R.A.1-4).

Petitioner's accusations of "racial bias" (which he also raised with the Court of Appeals) are unfounded and cannot change these unalterable facts. Indeed, the supposed "racial bias" actually reflected an attempt by the District Court to steer petitioner away from difficulty. Petitioner's abuse and disregard for the judicial process more than justifies the dismissal of this action.

REASONS FOR DENYING THE PETITION

I. Petitioner Has Failed To Identify Any Question Subject To Review By This Court On A Writ Of Certiorari

Petitioner's brief fails to identify any issue warranting review by this Court of the decisions below. *(See* Petition 2-10.) This routine patent infringement suit was dismissed in accordance with well-established principles of civil procedure because of petitioner's misconduct throughout the proceedings in the District Court. (*See* R.A.5-21.)

Petitioner cannot overcome the routine nature of this action and the District Court's dismissal by hurling unfounded accusations of racial prejudice at the Magistrate Judge and the

District Court. As explained infra, it was petitioner's own behavior during the course of this litigation, not any racial bias by the Magistrate Judge or the District Court, that led to dismissal of petitioner's action.

A. This Court's Standards For Consideration On A Writ Of Certiorari Are Not Met Here

Review by this Court on a writ of certiorari is not a matter of right, but rather is a matter of judicial discretion. Sup. Ct. R. 10. Such discretion is exercised in the presence of "compelling reasons." *Id.*

None of the traditional bases for review on a writ of certiorari is present here. *Id.; see also Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (The primary reason for review by the Supreme Court on certiorari is to resolve conflicts among the courts of appeals and state courts concerning the meaning of provisions of federal law.); *Appalachian Power Co.* v. *American Inst. of Certified Pub. Accountants*, 80 S. Ct. 16, 17 (1959) (In the absence of divergent views among the federal appellate courts, the Supreme Court will not review a District Court's judgment that is based on the application of the Federal Rules of Civil Procedure and which has been affirmed by the Court of Appeals.). This case does not present an issue that has been decided inconsistently by the circuit courts of appeals. *Id.* This case also does not raise a question of unsettled federal law. *Id.* Nor do the decisions below evidence a "depart[ure] from the accepted and usual course of judicial proceedings." *Id.* To the contrary, this case presents nothing more than a last-ditch-effort by a defiant litigant to resurrect a case that was properly dismissed because of his deliberate failure to comply with Court Orders.

B. The District Court's Dismissal Of This Action Was An Appropriate Sanction For Petitioner's Refusal To Cooperate In Discovery

The District Court dismissed petitioner's action because of petitioner's repeated refusal to cooperate in discovery, including his refusal to comply with Court Orders and culminating in his refusal to submit to deposition. (R.A.5-21.) In so doing, the District Court relied upon well-settled principles of law. (R.A.5-21.)

As this Court has recognized, dismissal of an action with prejudice pursuant to Fed. R. Civ. P. 37(b)(2)(C) is a sanction that is available to a district court for a party's violation of discovery deadlines and Orders. *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976) (plaintiff's noncompliance with a discovery Order warranted dismissal, particularly where plaintiff had been warned that such behavior could result in sanctions); *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."); *see also Ehrenhaus* v. *Reynolds*, 965 F.2d 916, 918-20 (10th Cir. 1992) (dismissal of an action is an appropriate sanction for a party's failure to permit or provide discovery); *Mobley* v. *McCormick*, 160 F.R.D. 599, 601-02 (D. Colo.) (dismissal was an appropriate sanction where plaintiff repeatedly and intentionally "flouted, disregarded and disobeyed the orders of this court, while simultaneously failing to offer any satisfactory justification for his actions"), *aff'd without op.*, 69 F.3d 548 (10th Cir. 1995); Fed. R. Civ. P. 37(b)(2)(C), 41(b).

A litigant's pro se status is not a license for that litigant to ignore Court Rules and Orders. As noted by the Court in *Kearns* v. *General Motors Corp.*, No. 85-70461, mem. op. at 9 (E.D. Mich. July 27, 1993), *aff'd without op.*, 31 F.3d 1178 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995):

> The civil justice system can absorb just so much abuse from a *pro se* litigant. Plaintiff clearly exceeded the limit of abuse and for that reason this case is no longer in court.

(footnote omitted).

Petitioner's conduct before the District Court is precisely the type of behavior that warrants dismissal.[2] (*See* R.A.5-21.) Petitioner repeatedly refused to comply with Court Orders. (R.A.6, 9-21.) Petitioner was fully capable of complying with these Orders, but simply chose not to. (R.A.12-21.) In addition, petitioner adamantly refused to appear for his deposition. (R.A.6, 9-16.)

The Magistrate Judge did all that was required before recommending that the District Court dismiss the action. *See Ehrenhaus*, 965 F.2d at 918-20; *Mobley*, 160 F.R.D. at 601-02. When petitioner insisted that he would not appear for his deposition, the Magistrate Judge warned petitioner that such refusal would result in dismissal of the action. (R.A.9-16.) Moreover, prior to issuing the Recommendation For Dismissal, the Magistrate Judge considered the possibility of lesser sanctions. (R.A.15.) However, because lesser sanctions had been attempted in the past and had proven ineffective, the Magistrate Judge concluded that dismissal was the appropriate sanction. (R.A.15.)

Petitioner's allegations that the Magistrate Judge and the District Court Judge were "racially biased" is nothing more than an attempt to find a cognizable basis for this Court to review the decisions below. Petitioner should not be allowed to manipulate the judicial process in this manner.

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[2] The most egregious examples of petitioner's behavior are set forth in detail in the Magistrate Judge's Recommendation For Dismissal and will only be summarized here. (*See* R.A.9-21.)

The disingenuous nature of petitioner's allegations of racial bias is readily apparent from petitioner's own submission to this Court. On page 4 of petitioner's brief as well as on page 8 of the appendix to petitioner's brief, the Magistrate Judge's advice to petitioner is presented in its complete form. (Petition 4, A8.) When viewed in context, it is clear that the Magistrate Judge made the statements that petitioner now relies on to advance his theory of "racial bias" while advising petitioner that his failure to obtain counsel and a technical expert to assist him in this complicated patent infringement suit would severely prejudice petitioner. (*See* Petition 4, A8.) Petitioner's attempt to use the Magistrate Judge's well-intended advice as a pretext for claiming a civil rights violation is regrettable, but it is no excuse for the misconduct that led to the dismissal of this action.

II. The Court Of Appeals Has The Authority To Enter A Judgment Of Affirmance Without An Opinion

Petitioner assigns error to the Court of Appeals because it affirmed the District Court's dismissal without entering a written opinion. (*See* Petition 9.) Petitioner's argument implies that because the Court of Appeals did not issue an opinion petitioner's appeal did not receive the proper consideration and review. This contention is without merit.

The authority of courts of appeals to render judgments without opinion has been recognized by this Court. In *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972), this Court acknowledged the importance of this authority, particularly with respect to summary affirmances:

> We, of course, agree that the courts of appeals should have wide latitude in their decision of whether or how to write opinions. This is especially true with respect to summary affirmances.

This authority is embodied in the Federal Rules of Appellate Procedure -- the rules adopted by this Court to govern the practice and procedure of federal courts of appeals. These rules expressly contemplate that appeals may be decided without an opinion. Fed. R. App. P. 36.

A provision of similar import is contained in the local rules of ten of the thirteen courts of appeals. *See, e.g.*, D.C. Cir. R. 36; 1st Cir. R. 36.1; 2d Cir. R. 0.23; 5th Cir. R. 47.6; 6th Cir. R. 19; 8th Cir. R. 47B; 9th Cir. R. 36-1; 10th Cir. R. 36.1; 11th Cir. R. 36-1; Fed. Cir. R. 36. Thus, the Federal Circuit is not alone in permitting such judgments of affirmance without opinion.

Judgments that are issued without opinion receive no less consideration than judgments that are issued with opinions. In this regard, the Federal Circuit has noted:

> Appeals whose judgments are entered under Rule 36 receive the full consideration of the court, and are no less carefully decided than the cases in which we issue full opinions. The Rule permits the court to dispense with issuing an opinion that would have no precedential value . . . .

United States Surgical Corp. v. *Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir. 1997); *see also Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) ("The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal."); *United States* v. *Baynes*, 548 F.2d 481, 483 (3d Cir. 1977) ("'[O]ur experience, bearing out that of appellate courts generally, is convincing that in a number of cases there is no real need for an opinion at all.'" (citation omitted)).

Since an affirmance by the Federal Circuit without opinion is completely proper, petitioner's assertions to the

contrary must fail. Accordingly, this Court should deny the Petition.

CONCLUSION

Lew's Petition for Writ of Certiorari does not identify any valid basis for this Court to exercise its discretion and review the decisions below. Dismissal of this action was caused by nothing other than petitioner's obstruction of the discovery process. No litigant, pro se or otherwise, can expect to retain the right of access to the United States Courts if he is unwilling to comply with the Rules and Orders that govern these Courts. Consequently, Lew's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Date: June 2, 1997.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: 02/10/97

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented

by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

JAN HORBALY

Clerk

cc: HYOK S. LEW

JESSE J. JENNER

LEW V ROSEMOUNT INC, 97-1030
DCT CO - 96-1223 & 96-1257

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-1030

HYOK S. LEW,

Plaintiff-Appellant,

v.

ROSEMOUNT, INC.,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT DISTRICT OF COLORADO

In CASE NO(S). 96-1223 & 96-1257

This CAUSE having been heard and considered, it is ORDER and ADJUDGED:

Per Curiam: (MAYER, PLAGER, and RADER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

R.A. 4

ENTERED BY ORDER OF THE COURT

DATED FEB 10 1997

/s/ JAN HORBALY
Jan Horbaly, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Case No. 95-B-200

HYOK S. LEW, an individual,

Plaintiff,

v.

ROSEMOUNT, INC., a Minnesota corporation,

Defendant.

ORDER

This case is before me upon the following: 1) Magistrate Judge O. Edward Schlatter's March 11, 1996 recommendation that this action be dismissed with prejudice; 2) defendant's motion to dismiss upon the basis stated by the magistrate judge in his recommendation; 3) plaintiff's objection to the magistrate judge's recommendation; 4) "Plaintiff's Response Objecting to Rosemount Inc.'s Motion To Dismiss, Plaintiff's Motion Requesting Voluntary Withdrawal Of Magistrate O. Edward Schlatter From The Lawsuit, And Plaintiff's Motion To Sanction Defendant For Harassing Plaintiff By Means Of Criminal Acts"; 5) Defendant's opposition to motion to stay the order of March 1, 1996 and motion to strike; and 6) "Plaintiff's Objection To Rosemount's Motion To Strike Lew's Motion To Stay The Order Of March 1, 1996 And Plaintiff's Motion To Have Hearing And To Report Crimes Committed By Defendant And Its Counsels To The Criminal Division Of U.S. Attorney's Office And The Office Of FBI."

The magistrate judge has recommended dismissal of this action for plaintiff's refusal to cooperate in discovery. He cites as examples, plaintiff's refusal to appear at his deposition, plaintiff's refusal to agree to an English translation of a prior art Japanese patent, the content of which contains all the revisions that plaintiff previously requested, plaintiff's obstruction of service of a subpoena upon a third party, and continued inclusion of scandalous and impertinent matter in papers filed with the court despite explicit warnings that plaintiff refrain from such conduct. The magistrate judge found in his recommendation that plaintiff's conduct caused defendant to suffer unnecessary expense, delay, and constituted abuse beyond the limits any litigant should be expected to bear.

I have reviewed the magistrate judge's recommendation de novo. My de novo review of the record in this case reflects that the magistrate judge's comprehensive and thorough recommendation is clearly supported by the record. Indeed, the prolix pleadings filed by plaintiff following the issuance of the magistrate judge's recommendation are replete with continued scandalous and impertinent matter wholly beyond the bounds of any reasonable judicial tolerance. I conclude from my review of the record that plaintiff's continuous obstreperous and impertinent conduct constitutes unconscionable abuse of the judicial process which requires no less than the sanction of dismissal of this action with prejudice. I further conclude that plaintiff's allegations of improper, unethical, and criminal conduct on the part of defense counsel and the magistrate judge are baseless. Accordingly,

IT IS ORDERED that the recommendation of the magistrate judge is approved, defendant's motion to dismiss is GRANTED, and the above action is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that "Plaintiff's Objection To Rosemount's Motion To Strike Lew's Motion To Stay The Order Of March 1, 1996 And Plaintiff's Motion To Have

Hearing And To Report Crimes Committed By Defendant And Its Counsels To The Criminal Division Of U.S. Attorney's Office And The Office Of FBI" is STRICKEN as scandalous and impertinent.

IT IS FURTHER ORDERED that plaintiff's motion for withdrawal of the magistrate judge is DENIED.

IT IS FURTHER ORDERED that the remaining pending motions are DENIED as moot.

IT IS FURTHER ORDERED that the defendant shall have its costs in this action.

IT IS FURTHER ORDERED that any further abuse of the judicial process by the plaintiff as has been repeatedly demonstrated throughout the course of this action while appearing pro se shall subject the plaintiff to further sanctions, including but not limited to, additional costs and/or attorney fees incurred as a result, and the entry of an order barring plaintiff from filing any pleadings in a pro se capacity rather than through an attorney of record appearing on his behalf.

BY THE COURT:

/s/ LEWIS T. BABCOCK
Lewis T. Babcock, Judge

DATED: April 17, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 95-B-200

CERTIFICATE OF MAILING

I certify that a copy of order was mailed to the following on April 18, 1996.

Hyok S. Lew
7890 Oak Street
Arvada, CO 80005

William E. Murane, Esq.
Michael Noone, Esq.
Holland & Hart
D.C. Box No. 6

Jesse J. Jenner, Esq.
Denise L. Loring, Esq.
John C. Vetter, Esq.
Fish & Neave
1251 Avenue of the Americas
New York, NY 10020

Magistrate Judge O. Edward Schlatter

/s/ N. HATCHER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action Number: 95-B-200

HYOK S. LEW,

Plaintiff,

vs.

ROSEMOUNT, INC.,

Defendant(s).

RECOMMENDATION

RECOMMENDATION ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

Shawn Schroeder, Secretary

This is a patent infringement case. Plaintiff (plaintiff or Dr. Lew) is suing defendant, Rosemount, Inc., in order to establish that defendant is marketing an item which violates a patent on a device which he invented. Plaintiff was originally represented by George G. Matava of Sheridan Ross & McIntosh, P.C. That firm was granted leave to withdraw on July 31, 1995, and plaintiff has been representing himself since that date.

Plaintiff has engaged in conduct which prompts me to recommend that his case be dismissed. Plaintiff stated to me during a recorded telephone conference that he would not appear for a deposition to which he had been noticed by defense counsel. He persisted in his refusal in spite of warnings from me that I would recommend that his case be dismissed.

I am well aware that lesser sanctions should be considered before the extreme remedy of dismissal is ordered. I have also given due consideration to the fact that plaintiff appears without counsel.

I

The incident which precipitated this recommendation occurred on March 1, 1996. Pursuant to a request from defendant, I conducted a telephone conference on that date with plaintiff and several attorneys for defendant, of whom Jesse Jenner, Esq., was the principal speaker. The telephone conference was recorded by electronic tape recording.

Defense counsel advised me during the conference that plaintiff was noticed in for deposition to be conducted in my chambers on March 5, 1996. The deposition was to be conducted in my chambers because of the lack of cooperation from plaintiff which defense counsel had encountered on numerous occasions. Counsel wished to have my guidance on plaintiff's stated intent to ignore the notice of deposition. They did not wish to suffer the costs which would be incurred for several attorneys to travel to Denver from out-of-state only to have plaintiff not appear.

In a letter of February 22, 1996, mailed to John Vetter of Fish & Neave, one of the attorneys for defendant, plaintiff wrote:

> Secondly, I am objecting to the notion of Ms. Denise L. Loring [another attorney for defendant] about taking deposition of me (Hyok S. Lew) on March 05, 1996, and I will not make myself available to such a deposition in view that, firstly, Rosemount has defaulted its right to take deposition of me by intentionally and willfully elapsing the Discovery Deadline of February 02, 1996, and secondly, Rosemount's scheme to take deposition of me after the Discovery Deadline of February 02,

> 1996[,] has NO CAUSE other than Rosemount's counsels' malpractice to harass and torment Dr. Lew. The issue of Extension of Discovery Deadline will be taken all the way to U.S. Court of Appeals for Tenth Circuit if necessary, because I believe firmly that the Court of Appeals is the only judicial authority that will provide a lawful and logical ruling on the issue.

(Letter of Yew to Vetter, attached to defendant's Motion for Telephone Conference, filed February 27, 1996.)

The "discovery deadline" issue which concerned plaintiff, and which he apparently intends to appeal, arose during a telephone conference which was conducted before me, on the record, on January 24, 1996. During that hearing, defense counsel pointed out that discovery had been delayed because plaintiff had not provided to counsel the materials which were necessary for counsel to conduct a deposition of plaintiff, and because plaintiff had, at one point, attempted to conduct an appeal of this case to the Tenth Circuit Court of Appeals. I found that good grounds existed to extend the discovery deadline from February 2, 1996, to March 15, 1996, approximately 45 days, and it was so ordered. (Transcript of Hearing, p. 15, and Order of March 1, 1996.)

English is not plaintiff's native language, and it is extremely difficult to understand him. A transcript of the telephone conference which was conducted on January 24, 1996, reflects that the transcriber understood less than one-third of plaintiff's remarks. The remainder of his comments were reflected in such notations as "inaudible words" or "indistinguishable paragraph." I have advised plaintiff during previous proceedings that he should obtain the assistance of an attorney to represent him, and that he was hurting his own case by virtue of the fact that others could not fully understand him. Plaintiff has ignored that advice.

During the telephone conference of March 1st, I expressly asked plaintiff whether he intended to absent himself from the deposition to which he had been noticed. Although I have commented that it is difficult to understand plaintiff, it was not difficult to understand him to state, firmly and unalterably, that he would not appear for any deposition by defendant. I advised plaintiff that I would find that he was not cooperating with the litigation and the discovery process, and I warned him that I would recommend to District Judge Lewis T. Babcock that his case be dismissed as a sanction. Having been warned that a recommendation for dismissal would be the consequence of his refusal to attend his deposition, plaintiff continued to assert, unequivocally, that defendant had no right to take his deposition, and he stated that he would not appear in response to the notice.

I noted for plaintiff that a deposition of him would be extremely routine, and that it is virtually always necessary. The necessity of plaintiff's deposition in this case is heightened by the fact that not only is Dr. Lew the plaintiff in this matter, he is also the only expert he intends to endorse.

The likelihood that my extension of the discovery deadline from February 2, 1996, to March 15, 1996, will be overturned by Judge Babcock or the Court of Appeals is so remote that plaintiffs refusal to be deposed until after he has appealed my order borders on the absurd. The trial is currently scheduled for December 2, 1996. Adjustment of the discovery deadline is clearly within my discretion as a Magistrate Judge, and even if my extension of the discovery deadline were reversed, it is still within my discretion to allow a deposition of plaintiff after any expiration of the deadline. In other words, plaintiff can have no hope of any success on an appeal, and, at any rate, he would face a deposition at the conclusion of any appeal.

Ordinarily, I would issue an order to plaintiff to show cause as to why a recommendation should not be submitted to Judge Babcock that his case be dismissed. In these circumstances,

such a show cause order would be futile. Plaintiff was provided with the opportunities of a show cause hearing during the telephone conference.

The facts in this case are very similar to those which were presented to the trial court in Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992). The District Judge in Ehrenhaus ordered a case dismissed upon a finding that plaintiff had willfully violated the court's order to appear at a deposition. Id. at 919. The Circuit Court affirmed the order of dismissal, and described the manner in which the trial court should proceed in weighing dismissal as a sanction.

> [A] court should ordinarily consider a number of factors, including: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant" [citations omitted]; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance. . . . "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." [Citation omitted.]

Id. at 921. Finally, the Circuit Court noted that judge's should consider the efficacy of imposing lesser sanctions. Id.

I have considered the Eherenhaus factors, and make the following findings:

1. Degree of Prejudice. This case is an extremely expensive lawsuit for defendant. Plaintiff has elected to minimize his expenses by permitting the withdrawal of his attorney, and by proceeding with no attorney. He has further minimized his expenses by refusing to hire an independent expert, and by insisting that he will be his own expert in the case. Defendant, on the other hand, has significant legal expenses for the team of lawyers who are assigned to this case, and for the experts who have been retained to assist in the case.

Plaintiff's refusal to be deposed has caused undue delay and expense to defendant. Plaintiff has interrupted this case once before with a futile attempt to have the Tenth Circuit Court of Appeals correct what he perceives to be errors or mistakes, and he is now threatening to do so again. His claim that an extension of the discovery deadline is so erroneous that he need not submit to deposition is completely unreasonable.

2. Interference With the Judicial Process. The Tenth Circuit held in Ehrenhaus, "When he wilfully failed to comply with a direct court order, Ehrenhaus flouted the court's authority." Id. at 921. The Circuit court approved the order of Judge Daniel B. Sparr where he stated, " 'If this debtor could ignore court orders here without suffering the consequences, then (the district c)ourt cannot administer orderly justice, and the result would be chaos.' " Id. Identical circumstances exist here. Plaintiffs remarks during the March 1st hearing reflect that he obeys only court orders with which he agrees.

3. Culpability of the Litigant. Plaintiff wilfully and intentionally refused to comply with the notice to appear for deposition in the very face of my admonition that I would recommend dismissal of his case if he persisted in his refusal. Plaintiff is entitled to a certain amount of deference in light of the facts that he is proceeding pro se, and he has a less-than-fluent command of the English language. However, plaintiff is a highly-educated scientist with a Ph.D. in a technical, scientific field. He holds a patent for a flow meter device, his patent is the subject of this litigation and he has selected himself as his expert. The written documents which he has submitted to the court in this case, prepared by himself, reflect that he has an excellent understanding of the English language. He has never stated that he does not understand what is being said to him by the court. Rather, his response to comments or directions reflects that he does not agree with the court, and will file appeals until he finds a court which does.

4. Notice or Warning. Plaintiff was expressly warned that his refusal to appear for deposition would result in a recommendation for dismissal. Plaintiff made no excuses for his refusal. As noted, he simply insists upon his right to defy the courts when he believes himself to be correct.

5. Efficacy of Lesser Sanctions. Lesser sanctions have been attempted, and were ineffective. During the telephone conference of January 24, 1996, defense counsel asked me to grant defendant's Motion to Strike, filed January 2, 1996, in which counsel outlined all of the scandalous, abusive and insulting language which plaintiff persists in using in all of his pleadings. Fed.R.Civ.P. 12(f); Biggs v. Cummins, 16 Ill.2d 424, 425, 258 N.E.2d 58, 59 (1959); In re Moody, 105 B.R. 368, 370-71 (S.D.Tex. 1989). As examples, counsel listed such accusations against counsel and the court by plaintiff as "felonious crime," "mail fraud," "alter[ing] and doctor[ing]" documents, "blatant lie" and "perjury." Plaintiff referred to counsel as a "stupid moron," and accused me of "aiding and abetting the felonious criminal acts of the defense counsels." The examples would fill pages. Virtually all of plaintiff's pleadings are filled with a continuous flow of invective, insult and abuse.

I denied defendant's Motion to Strike plaintiff's pleadings. However, I warned plaintiff in the sternest of language that if he persisted in using such terms in the future, I would strike any pleading in which the terms or phrases appear. ((Transcript of Hearing, January 24, 1996, p. 20.) Despite this warning, plaintiff has refused or declined to alter his language. All of the pleadings filed by plaintiff after the telephone conference of January 24, 1996, reflect that the flow of insult and abuse continues. Plaintiff has not diminished the use of scandalous invective in the slightest. It is clear that warnings that his pleadings will be stricken have no effect upon him.

II

Plaintiff's refusal to attend his deposition is sufficient, in itself, to support my recommendation that his case be dismissed. However, plaintiff has engaged in other activities which have greatly increased the expenses and burdens of defendant in this litigation. These activities further justify the extreme sanction of dismissal.

A

Defense counsel attempted over a period of several months to obtain from plaintiff a stipulation with regard to the translation of a document from Japanese to English. A stipulation was considered desirable by defense counsel in order to eliminate future battles over the accuracy of the document as translated.

At least as early as October 13, 1996, during a telephone conference, plaintiff expressed objections to the translation which had been obtained by defendant. Plaintiff was ordered by me on October 23, 1995, to provide defendant with a translation which he believed to be more accurate. On October 27, 1995, plaintiff filed a document in which he objects to my order. (Plaintiff's Objection to Magistrate's Order of October 23, 1995.) Because a stipulation with regard to the accuracy of a translation is a desirable goal, it is impossible to understand why plaintiff would object, as he does, to my directions that he provide defendant with his translation of the document, or his version of any disputed phrases. Plaintiff even considers my order that he use overnight mail to be an abridgement of his freedom of expression, and a violation of his "unalienable [sic] right to choose means for sending the documents." Id. at 6.

In December, 1995, and January, 1996, plaintiff and defense counsel exchanged letters with regard to this dispute. The letters and documents are attached to defendant's January 22, 1996, "Submission for the January 24, 1996, Status Con-

ference (Submission) The letters from plaintiff again reflect the vituperation and invective which characterizes all of plaintiff's written materials. More importantly, the letters demonstrate that plaintiff had no good reason for refusing to enter into a stipulation with regard to the translation.

On December 1, 1995, Jesse Jenner, counsel for defendant, wrote to plaintiff indicating a willingness on defendant's part to accept plaintiff's translation to the only two phrases which were disputed by plaintiff. (Submission, Exhibit 1.) By return mail of December 8, 1995, plaintiff continued to rail about the lack of honesty of defense counsel, and refused to agree to any stipulation. (Submission, Exhibit 2.) In a letter of December 27, 1995, plaintiff describes defendant's efforts to obtain a stipulation as "a ruse to cheat and deceive" plaintiff. (Submission, Exhibit 4.)

By the time of the telephone conference of January 24, 1996, plaintiff still refused to enter into a stipulation with regard to the accuracy of a translation. I ended the dispute by ordering that his versions of the two disputed phrases be adopted and inserted, and by ordering that as so amended the translation would be considered accurate and official.

Plaintiff offers emotional grounds for refusing to stipulate to a translation, but he offers no legitimate reasons for his refusal. It is clear that a great deal of time was spent by defense counsel in a needless and senseless exercise. In the circumstances of this case, it is unfair to require defendant to be burdened with the undue costs and expenses which are created by plaintiff's irresponsible behavior.

B

During the telephone conference of January 24, 1996, defense counsel pointed out that they had been attempting to serve a subpoena upon any of the officers of a business called "Rete" corporation ("Redtay" in the transcript), and that plaintiff was deliberately obstructing efforts at service. Coun-

sel indicated that this corporation was apparently owned or operated by immediate members of plaintiff's family, such as his wife and sons, and that the operations of this business were related to the patent issues in this lawsuit. Counsel stated that when at least two efforts were made to serve a subpoena at plaintiff's residence, where the members of the family lived, "the door was closed in his face." (Transcript of Hearing, January 24, 1996, p. 7.)

Plaintiff admitted that Rete corporation was a family-owned business, admitted that the entire family lived at his residence and admitted that the process server was sent away each time he attempted service. Id. at 7-8. When asked by me whether someone would now accept service, plaintiff answered, "No," because "I hold my house is a respectable [sic], it's not for police...." Id. at 6. Further remarks by plaintiff during the telephone conference appeared to indicate that he and the family would not cooperate with defendant's efforts to serve a subpoena. I resolved the dispute by declaring that service could be accomplished by posting or taping the subpoena to the door of the residence. Id. at 12.

Plaintiff can have no reasonable justification for his refusal to cooperate, and none was offered by him during the telephone conference. Plaintiff's refusal to cooperate with service is one more example of actions by plaintiff which cause defendant to suffer exceptional costs and burdens.

III

The sanction of dismissal is justified in this case. Fed.R.Civ.P. 37(b)(2)(C) and 41(b). The Tenth Circuit Court of Appeals has affirmed the dismissal of cases for conduct by plaintiffs which was similar to that of plaintiff in this present case. Jones v. Thompson, 996 F.2d 261, 266 (10th Cir. 1993) ("The Plaintiffs repeatedly ignored court orders to submit themselves for depositions, to conclude discovery, and to come prepared to pretrial conferences."); Bud Brooks Truck-

ing, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437 (10th Cir. 1990) (dismissal appropriate for failure to comply with scheduling and discovery deadlines); In re Standard Metals Corp., 817 F.2d 625, 629 (10th Cir. 1987) (failure to appear at deposition warranted dismissal); Mertsching v. United States, 704 F.2d 505, 506 (10th Cir. 1983)(failure to answer questions at a deposition warranted dismissal).

I therefore RECOMMEND that plaintiff's cause of action be DISMISSED with prejudice for his refusal to appear at his deposition, and for his conduct in causing "unnecessary delay or needless increase in the cost of litigation." Fed.R.Civ.P. 11 (b)(1). An advisement to Dr. Lew of his RIGHTS TO APPEAL from this order within ten days pursuant to Fed.R.Civ.P. 72 is attached to this recommendation.

In the event District Judge Lewis T. Babcock declines to accept my recommendation for dismissal, I reserve the authority to impose such other sanctions as I consider appropriate for the discovery abuses by plaintiff which I have described in this recommendation, including the striking of pleadings, Fed.R.Civ.P. 12(f), and the imposition of fees and costs. 28 U.S.C. § 1927.

DATED at Denver, Colorado on: March 11, 1996

BY THE COURT:

/s/ O. EDWARD SCHLATTER

O. Edward Schlatter

United States Magistrate Judge

Copies of the foregoing Recommendation were duly mailed to the following:

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DATED: March 11, 1996

/s/ SHAWN SCHRODER
Secretary to Magistrate Schlatter

ADVISEMENT UNDER FED. R CIV. P. 72

Be advised that all parties shall have ten (10) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. FED. R. CIV. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. Thomas v. Arn, 474 U.S. 140, 155 (1985); Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1164 (10th Cir. 1986).